2008

State of Utah v. Joe David Bosquez : Reply Brief

Utah Court of Appeals

Case No. 20080158-CA

IN THE
UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

Joe David Bosquez,
Defendant/Appellant

Reply Brief of Appellant

Appeal from conviction for driving under the influence, a third degree felony, and driving on alcohol restrictions, a class B misdemeanor, in the Eighth Judicial District Court of Utah, Duchesne County, presided by the Honorable John R. Anderson.

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ARGUMENT

Point IA. Preservation was created when the issue was raised at trial in the evidence and in the Defense's opening statement. Defense Counsel included the defendant's living condition at trial as part of the totality of the circumstances when determining if the Defendant was in actual physical possession of the vehicle. R. 146 Lines 9-16. Counsel continued to reiterate this issue throughout her questions and by the manner of presentation at trial. Counsel's failure to bring up the issue during her closing statement was a direct result of her need to address evidence that was entered that should have been suppressed, namely any statement to the effect that the Defendant drove to the store.

Point IB. Further, the legal authority behind this rule is not based specifically on intent to use the vehicle as a dwelling…there is no such holding in either direction that I was able to find. The legal basis of this claim is that the totality of the circumstances determine the element of actual physical control of the vehicle. *Richfield City v. Walker*, 790 P.2d 87, at 93 (Ut. App. 1990). In fact, the two cases relied upon in Appellant's brief, *State v. Barnhart*, 850 P.2d 473 (Ut. App. 1993) and *Walker*, indicate that there could be some use to the intent of the driver. Further, while the defendant's intention as to his ultimate destination has not been considered

definitive, the logic of the court's ruling would include circumstances that affect the circumstances to the point that the defendant's sleeping in a vehicle, because it was his home, fit in the totality of the circumstances.

True, there is evidence that may indicate that the defendant was in actual physical control of the vehicle, however, given that the defendant is the only one in the line of cases cited who has actively lived out of his vehicle and been found intoxicated therein, it seems clear that this court has never had to determine whether such additional information could tilt the scales towards a finding that the defendant did not have actual physical control of the vehicle.

Further, the nature of evidence admitted as to the defendant driving the vehicle, especially as it was tainted in closing arguments with the objection of the State while defense counsel pointed out the deficiencies of State's evidence provided the jury with a method of finding that the defendant had driven the vehicle, without adequate evidence, and allowed them to make a finding not consistent with actual physical control, justifying a remand of this case to retry the issue without the tainted evidence.

Point IC. Finally, the State's claim that the Defendant fully intended to exercise his option to return to the yard appears to ignore the statements made directly by the Defendant and mischaracterizes his testimony. The

State relies on the Defendant's direct testimony where he stated, "I want to kick back at the house, relax, watch some videos, eat dinner and, you know stuff like that." R. 182 Lines 7-9. While this statement alone appears to infer an intent to return home, the defendant clarified that when his associate Curtis, who had driven him to the store parking lot, indicated that he wanted to go out drinking, the defendant testified, "I was like, I don't have nowhere to go, nowhere to drive, I knew better, not to drive, so, I stayed in my car. My car was my home." R. 182 Lines 10-12. The defendant's testimony reaffirmed his intent to use his vehicle as his home and his willingness to remain at any location, whether in the yard, at the "pusher's" home, or wherever his car was located.

Defense requests that the court to rule that when an individual's sole abode is their vehicle, that such an individual would not be able to be in actual physical control of a vehicle for purposes of Utah's law regarding Driving Under the Influence. However, the Defense understands that the issue was unable to receive fair representation at the trial level due to trial counsel's failure to prevent the admission of evidence. Therefore, Defense's alternative request is for an opportunity for the issue to be heard at the District Court and for this court to remand the issue to the Eighth Judicial District to be able to address this issue.

The defense presented the argument of intent to remain in the vehicle, but did so without proper appeal or intention, thereby preventing the Defendant from obtaining valid defense levels. Without that assistance, Defendant was prejudiced from obtaining a thorough and full hearted defense as would be necessary for the defendant to obtain a fair trial.

Point 2A. Defendant adequately presented a valid ineffective assistance of counsel claim, which was replete with Prejudice, which could only been avoided had Trial Counsel's assistance been effective.

The statement is clearly hearsay under Utah Rules of Evidence 801. Appellant counsel should not be obligated to anticipate all situations under which hearsay would be admissible for a claim of inadmissible hearsay to be established. Appellee's claim for a nonhearsay justification for the evidence to be entered is not supported. Under *State v. Pedersen*, 2010 UT App 38, ¶36 this court reasoned that evidence could only be deemed not hearsay if it was unfairly prejudicial, "meaning it has an undue tendency to suggest decision on an improper basis, commonly but not necessarily an emotional one, such as bias, sympathy, hatred, contempt, retribution or horror." *quoting Woods v. Zeluff*, 2007 UT App 84, ¶ 7, 158 P.3d 552 (internal quotation marks omitted). In this case, the arguments presented in the initial brief are such that they infer actual driving by a defendant of a vehicle while

intoxicated, allowing a jury to infer guilt of that rule, without application to the evidence. In spite of a failure to cite significant legal authority, the argument presented developed a clear enough basis for appellee to present argument against those charges.

Point 2B. Furthermore, as the case law presented by the State shows, a jury instruction may provide grounds for ineffective assistance of counsel if the "jury was confused or misled by the instruction." *United States v. Valencia*, 907 F.2d 671 (7th Cir. 1990). Further, the objection provided under *State v. Malaga*, 2006 UT App 103, is not applicable in this case. In *Malaga* the jury instruction objected to had no supporting evidence to supply a jury's foundation to apply the conviction, *Malaga* at ¶ 15-16, there the defendant was being charged as a principal, and the alternate language regarding accomplice liability was not applicable to his situation. With our case, however, we find that objectionable hearsay was provided to the jury's ears without objection, argument was made in closing argument, which was objected to, highlighting the error, and a jury instruction was included the elements of the crime for which the objectionably admitted evidence would have been intended to establish. The real danger of this ineffective assistance of counsel is that by being forced to focus on evidence supplied, which would have properly been omitted from the record, trial counsel was

unable to effectively argue those positions which would have supported overturning the conviction, thus allowing for the alternate outcome.

CONCLUSION

The failure of counsel, coupled with the errors of testimony and evidence submitted to the court, along with an unsuccessful attempt to bring a significant issue before the trial court, which prevented the jury from having being enabled to make a fair declaration.

Therefore, this case should be dismissed. The reasons for this are the lack of evidence that Appellant actual drove the vehicle and that there is substantial evidence that the Defendant's abode was his car within the parking lot of the store, which, given the totality of the circumstances should show that the Defendant was not in actual physical control of the vehicle.

In the alternative, because the trial court/jury was hampered in their ability to reach a valid determination due to prejudicial information reaching the jury, the case should be remanded to the District Court and a new trial ordered.

Dated this 12th day of May, 2011.

Brett M. Kraus

Attorney for the Appellant

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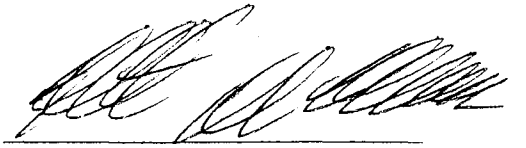

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply Brief of Appellant* was mailed to the following this 13th day of May, 2011:

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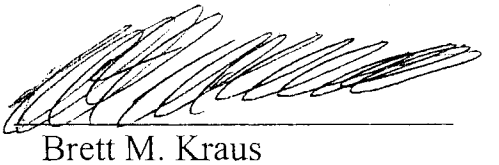

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